No. 96-1149

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAEFFER, JR., its administrator and fiduciary,
Petitioners,

v.

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORTATION, INC.; TIGER INTERNATIONAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

GERALD M. FEDER *
DIANA L.S. PETERS
FEDER & ASSOCIATES, P.C.
1350 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036-1712
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves this Court for leave to file the accompanying Brief *Amicus Curiae,* in which we urge the Court to review the decision below.

At issue in this request for review is the proper standard for construing Section 1392(c) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1392(c), ("MPPAA") which permits trustees to disregard transactions undertaken by employers for the principal purpose of evading or avoiding withdrawal liability under the statute.

The Third Circuit's ruling in the case at bar is fundamentally at odds with the standard adopted by the Seventh Circuit, and lower courts as well as arbitrators are uncertain of the standard to apply, as the case law indicates. However, there are countless ways employers can restructure their businesses and, as the facts of this case reveal, millions of dollars of withdrawal liability are often at stake in "evade or avoid" disputes. Therefore, a misreading of this critical provision of the statute can have a substantial adverse effect on multiemployer plans. Thus, this appeal raises an issue of great national importance affecting the multiemployer plan community, generally, the participants and beneficiaries of multiemployer pension plans, employers who continue to select multiemployer plans as the vehicle for providing pension benefits, and the public at large, which can be presumed to have a significant interest in workers' receiving their anticipated benefits upon retirement.

As will be discussed further below, the NCCMP is well equipped to advise the Court on the issues raised by the Third Circuit's ruling and therefore files this Motion, as Petitioners have consented to the filing of an *amicus* Brief, but Respondents have not. The letters granting and refusing the NCCMP's request for consent have been filed with the Clerk of the Court.

INTEREST OF THE NCCMP

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to

participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans. Currently, more than 240 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP. These affiliated plans not only represent a majority of participants in multiemployer plans around the nation, but are also representative of the multiemployer plan community generally.

Because of the broad range of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. For this reason, the NCCMP frequently participates as an *amicus curiae* before this Court as well as before the various courts of appeals. With regard to withdrawal liability assessments under MPPAA, the NCCMP has represented the interests of multiemployer plans in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connolly v. PBGC*, 475 U.S. 211 (1986); and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The NCCMP recently also filed an *amicus* Brief in *Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California* (No. 96-370), which is presently awaiting the views of the Solicitor General and a decision on the Petition. Additionally, the NCCMP has been recognized as having had a "significant impact" on MPPAA by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980) and S1010 (daily ed. July 29, 1980).

In the present case, the NCCMP respectfully requests this Court to adopt a uniform standard for interpreting Section 1392(c) of MPPAA. This is particularly critical, as Congress intended that "evade or avoid" disputes be

resolved in arbitration, and there are no binding arbitration precedents to assist arbitrators in their adjudicatory function. Therefore, considerable disarray exists at this time. Moreover, as "evade or avoid" disputes are generally complex and involve mixed questions of fact and law, it is frequently difficult for a reviewing court to evaluate whether the arbitrator correctly applied the presumption favoring the trustees' determinations. As federal courts also owe a substantial degree of deference to the arbitrator's factual findings, and it is often difficult to separate the factual findings from the arbitrator's legal conclusions, a uniform standard is needed to ensure that federal courts apply the presumption attaching to the arbitrator's decision in the manner required by this Court in *Concrete Pipe, supra.*

The NCCMP is concerned that unless this Court reviews the Third Circuit's decision, and adopts a uniform standard for interpreting Section 1392(c) along the lines suggested by the Seventh Circuit, further misreadings of the statute will occur which may deprive plans of millions of dollars of withdrawal liability. If this occurs, the plan-protective purpose of Section 1392(c) will be eroded and retirement benefits placed at risk.

As the above result is inimical to the financial health of multiemployer pension plans, the NCCMP, on behalf of all of its affiliated pension plans, requests leave to file an *amicus* Brief in support of the Petition for *Certiorari.* In analyzing the conflicting circuit court approaches, the NCCMP will focus its discussion upon the practical consequences which a misreading of Section 1392(c) will have for multiemployer plans, a topic on which the NCCMP is uniquely able to provide information.

Respectfully submitted,

GERALD M. FEDER *
DIANA L.S. PETERS
FEDER & ASSOCIATES, P.C.
1350 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036-1712
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

* Counsel of Record

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTEREST OF THE NCCMP	4
SUMMARY OF REASONS FOR REVIEW	4
REASONS FOR REVIEW	7
I. THE STANDARD ESTABLISHED BY THE THIRD CIRCUIT IS INCONSISTENT WITH THE PURPOSES OF MPPAA, CONFLICTS WITH THE SOUNDER STANDARD APPLIED BY THE SEVENTH CIRCUIT, AND RENDERS SECTION 1392(c) INEFFECTIVE TO PROTECT MULTIEMPLOYER PLANS	7
A. The Third Circuit's Standard Is Inconsistent With the Purposes of MPPAA	7
B. The Third Circuit's Standard Conflicts With the Sounder Standard Applied by the Seventh Circuit	10
C. The Third Circuit's Standard Will Seriously Undermine the Plan-Protective Purpose of ERISA's Controlled-Group Definition of "Employer"	16
II. A UNIFORM STANDARD IS NECESSARY TO PROVIDE GUIDANCE TO ARBITRATORS AND COURTS AND TO DISCOURAGE FORUM-SHOPPING	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Page

Banner Industries, Inc. and Central States, Southeast and Southwest Areas Pension Fund, 11 Employee Benefits Cas. (BNA) 1149 (January 22, 1989) (Graham, Arb.), *vacated by settlement*, 12 Employee Benefits Cas. (BNA) 1992 (1990) .. 12, 14, 17

Central States, Southeast and Southwest Areas Pension Fund v. Marquette Bank, 836 F. Supp. 673 (D. Minn. 1993) 15

Central States, Southeast and Southwest Areas Pension Fund v. Minneapolis Van and Warehouse, 764 F. Supp. 1289 (N.D. Ill. 1991) 15

Concrete Pipe and Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) 4, 18

Connors v. Vick, 15 Employee Benefits Cas. (BNA) 1342 (S.D. W.Va. 1992) 15

Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 830 F.2d 1241 (3d Cir. 1987) 3

In re: The Sherwin-Williams Company and New York State Teamsters Conference Pension and Retirement Fund, 17 Employee Benefits Cas. (BNA) 2725 (February 7, 1994) (Gertner, Arb.) 10, 13, 14, 17

PBGC v. Ouimet Corp., 470 F. Supp. 945 (D. Mass. 1979) *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) 17

PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) 8

Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund, 22 F.3d 725 (7th Cir. 1994) 5, 10, 11, 14, 17

Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 96 F.3d 1432 (3d Cir. 1996) (Table) 2

Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 20 Employee Benefits Cas. (BNA) 1050 (D. Del. 1995) 2

TABLE OF AUTHORITIES—Continued

Federal Statutes Page

29 U.S.C. § 1301(b)(1) 6, 16, 18
29 U.S.C. § 1369(b) 9, 11
29 U.S.C. § 1384 ..... 8, 14
29 U.S.C. § 1385(b)(2)(B) 8
29 U.S.C. § 1386(a) 9
29 U.S.C. § 1392(c) ..... *passim*
29 U.S.C. § 1398(1) 9, 11
29 U.S.C. § 1398(2) 8
29 U.S.C. § 1399(c)(1)(B) 9
29 U.S.C. § 1401(b)(2) 19
29 U.S.C. § 1401(c) 18
29 U.S.C. § 1405(a) 9
29 U.S.C. § 1405(b) 9
29 U.S.C. § 1451(d) 19

Other

126 Cong. Rec. 23038 (1980) 10

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

At issue in this request for review is the proper standard for determining, under Section 1392(c) of the Multiemployer Pension Plan Amendments Act of 1980

("MPPAA"),[1] whether a transaction may be disregarded if a principal purpose of the transaction was to evade or avoid withdrawal liability.

In affirming the district court's opinion (without a separate opinion),[2] the Third Circuit has endorsed, as the governing precedent for the circuit, a standard that is inconsistent with the general remedial purposes of MPPAA as well as with the statute's specific antidumping objective, as reflected in Section 1392(c) and in other provisions as well, *infra*. Thus, the decision is adverse not only to the interests of multiemployer plans and their participants and beneficiaries, but also to contributing employers who do not withdraw (and will be left to fund shortfalls likely to result from the evisceration of Section 1392(c)). As well, the decision may prompt employers who might otherwise consider selecting a multiemployer plan as the vehicle through which to provide retirement benefits to their employees to reject this option due to the risk of additional liability, despite the significant economies of scale provided by such plans.

Specifically, the Third Circuit has endorsed a rule under which—at least in the context of the sale of a business—in order for the plan to collect the money due under MPPAA, the plan sponsor (*e.g.*, trustees of multiemployer plans) will need to prove not only that the seller intended to evade or avoid withdrawal liability, but that the buyer

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[1] Pub. L. No. 96-364. Further references to MPPAA will be to Title 29, U.S.C. 29 U.S.C. § 1392(c) provides: "If a principal purpose of a transaction is to evade or avoid withdrawal liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

[2] The Third Circuit's order is reported in table form as *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 96 F.3d 1432 (3d Cir. 1996) (Table). The district court's opinion is published as *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 20 Employee Benefits Cas. (BNA) 1050 (D. Del. 1995).

and seller were in collusion, the intent on both sides amounting to a conspiracy to defraud a pension plan. Although, as will be discussed below, the burden of persuasion is on the employer to prove by a preponderance of the evidence it did not have a principal purpose to evade or avoid withdrawal liability in a sale, the practical result of the Third Circuit's ruling is that, to prevail, it is the **trustees** who will be required to prove that no plausible and valid reasons existed for the transaction other than to avoid obligations to the plan; in essence, to prove that **the** primary purpose of the transaction on the part of an employer-seller was to evade or avoid withdrawal liability and that the buyer knew of this intent and colluded in it.

The National Coordinating Committee for Multiemployer Plans ("NCCMP") files this Brief as *amicus curiae* out of concern that unless the Third Circuit's ruling is reviewed and reversed, a standard of proof will be established with respect to determinations to be made under Section 1392(c), under which trustees will seldom (if ever) prevail; there will always be some plausible and valid reason for the sale of a business (or other commercial transaction) other than to evade or avoid withdrawal liability.

Moreover, as Congress intended that the resolution of "evade or avoid" disputes be resolved in arbitration, *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 830 F.2d 1241 (3d Cir. 1987), and as federal courts owe a substantial degree of deference to the arbitrator's findings, the NCCMP believes it is critically important for this Court to establish a uniform standard for determining whether a principal purpose of a commercial transaction was to evade or avoid withdrawal liability. A uniform standard is necessary to provide guidance to arbitrators around the country and to discourage forum-shopping by employers contesting an arbitration award. It will also serve as a guide for employers in planning corporate transactions.

Thus, the NCCMP respectfully urges this Court to review the decision below to resolve the conflict which presently exists between the Third and Seventh Circuits by adopting the sounder and more practical approach taken by the Seventh Circuit. This will ensure that Section 1392(c) retains the plan-protective purpose it was intended to serve and that the statutory presumptions upheld by this Court in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), are properly applied in "evade or avoid" disputes (which are factually complex and usually involve mixed questions of fact and law).

INTEREST OF THE NCCMP

The interest of the NCCMP has been stated in the attached Motion for Leave to file this Brief and is incorporated herein by reference.

SUMMARY OF REASONS FOR REVIEW

1. MPPAA was enacted to protect the financial soundness of multiemployer pension plans, and therefore the reliance interest of workers in their vested retirement benefits. To effectuate this goal, the statute requires employers withdrawing from multiemployer plans to pay their fair share of the plan's liability for unfunded vested benefits. While the statute contains a number of mitigating provisions that accommodate federal labor law principles as well as *bona fide* commercial transactions by exempting certain events from withdrawal liability, Congress did not intend to insulate employers from their statutory funding obligation if an employer engages in a transaction for a principal purpose of evading or avoiding withdrawal liability. Accordingly, Section 1392(c) expressly permits such transactions to be disregarded.

Significantly, as revealed both in the language of the provision and in its legislative history, Congress did not intend to limit the reach of Section 1392(c) only to trans-

actions having no economic substance or in which both parties collude to defraud a plan. Therefore, even if independent economic reasons justify the transaction, it may still be disregarded unless the employer shows by a preponderance of the evidence that withdrawal liability concerns were a minor, and not a principal, consideration. The Third Circuit's standard, which would require evasion or avoidance to be **the** principal purpose of the challenged transaction, is inconsistent with the plan-protective purpose of Section 1392(c) as well as with the remedial purpose and structure of MPPAA, *inter alia*, because it shifts the burden to the trustees to prove that no plausible and valid reasons existed for the transaction other than to avoid withdrawal liability.

2. By requiring the transaction to be a sham or fraud, in which both parties collude, the Third Circuit's standard conflicts with the sounder standard applied by the Seventh Circuit in *Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994). The NCCMP endorses the analysis of the Seventh Circuit, which provides the basis for a uniform standard without establishing a *per se* rule that would invalidate all stock sales. Reviewing the totality of facts and circumstances presented to the arbitrators, including the various possibilities available to the parent to rid itself of a financially troubled subsidiary, the court concluded that the transaction could be disregarded because divestiture would not have been effectuated through a sale of stock absent the prospect of withdrawal liability. This is an eminently practical approach.

3. The Third Circuit erred in concluding that a buyer must know of a seller's intent to evade or avoid withdrawal liability, and collude in it, for the transaction to be disregarded. The term "transaction," as used in Section 1392(c), does not require both parties to have the same knowledge and intent, no less the same fraudulent intent. Moreover, there are countless reasons why a buyer would

agree to purchase a failing company, without regard to actual or contingent withdrawal liability. The NCCMP concurs with those courts and arbitrators who have ruled that a buyer's knowledge and intent are irrelevant.

4. The Third Circuit's lenient standard, under which trustees will seldom (if ever) prevail, will also serve to erode the plan-protective purpose of Section 1301(b)(1), which treats all trades and business under common control as a single employer for all purposes of withdrawal liability. As in the case at bar, parent companies will be only too eager to sever their connection with a failing subsidiary to avoid joint and several liability for withdrawal liability debt. Thus, contrary to Congress's intent, the funding burden will be shifted to other employers, and/or retirement benefits will be placed at risk.

5. "Evade and avoid" disputes were intended to be resolved in arbitration. However, because of the difficulties in applying the statutory presumptions and the fact that arbitrations are not only complex but involve mixed questions of fact and law, a uniform standard is necessary to guide arbitrators and reviewing courts. Such a standard will help to ensure that the statutory presumption favoring the trustees' determinations is properly applied and that the presumption in favor of the arbitrator's decision does not end up harming plans in a manner which Congress did not intend. A uniform standard will also discourage forum-shopping.

REASONS FOR REVIEW

I. THE STANDARD ESTABLISHED BY THE THIRD CIRCUIT IS INCONSISTENT WITH THE PURPOSES OF MPPAA, CONFLICTS WITH THE SOUNDER STANDARD APPLIED BY THE SEVENTH CIRCUIT, AND RENDERS SECTION 1392(c) INEFFECTIVE TO PROTECT MULTIEMPLOYER PLANS.

A. The Third Circuit's Standard Is Inconsistent With the Purposes of MPPAA.

On September 26, 1980, MPPAA was signed into law to expand and enhance the protections of ERISA. In particular, Congress sought to protect the financial soundness of multiemployer pension plans by requiring employers to continue to fund the plans to which they had formerly contributed after those employers no longer had an obligation to contribute pursuant to written agreements (*e.g.*, collective bargaining agreements) or permanently ceased covered operations.

Central to passage of MPPAA was the fact that the Pension Benefit Guaranty Corporation, which does not receive its funding from Congress, would not have been able to guaranty the payment of vested retirement benefits for participants in multiemployer plans unless those plans had been charged unacceptably high premiums. Therefore, either participants would have been placed at risk with regard to their retirement benefits, or the burden of underfunding would have fallen on nonwithdrawing employers, as those employers would have been called upon to pay increased contribution rates, possibly prompting them to withdraw too. It was believed at the time that these forces would ultimately have resulted in massive plan terminations. Accordingly, Congress determined that employers—after withdrawal—should continue to pay their fair share of the plan's liability for unfunded vested benefits.

As this Court has emphasized in numerous decisions upholding the constitutionality of MPPAA, the fundamental goal of the legislation was to assure that workers and their families actually receive the retirement benefits upon which they relied, as long as the worker fulfilled the conditions required by the plan to obtain a vested benefit —a goal that could not be achieved in the long term if employers remaining in the plan were left "holding the bag" for funding deficiencies left by employers leaving the plan. *See, e.g., PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

Although MPPAA was designed to protect participants and beneficiaries by requiring employers withdrawing from multiemployer plans to continue to fund the plans, the statute nevertheless contains a number of mitigating provisions that accommodate federal labor law principles as well as *bona fide* commercial transactions, and reduce employers' liability burdens in the event an exemption from withdrawal liability does not apply.

With regard to labor law principles, for example, an employer does not withdraw solely because it suspends contributions during a labor dispute, 29 U.S.C. § 1398 (2), or if it substitutes one collective bargaining agreement for another agreement requiring the employer to contribute to the same plan. 29 U.S.C. § 1385(b)(2)(B).

With respect to commercial transactions, an employer does not withdraw from a plan—either completely or partially—by selling its assets if the seller and buyer comply with certain statutory requirements which reasonably ensure that contributions to the plan will continue uninterrupted. 29 U.S.C. § 1384.[3] Likewise, an employer

[3] Absent this rule, a sale of assets would result in a withdrawal even if the buyer assumed the seller's collective bargaining agreement and continued to make contributions, because the seller will have permanently ceased to have an obligation to contribute and/or has ceased covered operations. Four requirements must be met, as of the time of the sale, for the exemption to relieve the seller

does not withdraw as the result of a change in corporate structure (such as a merger, consolidation, or division) if the change does not cause an interruption in contributions or in the obligation to contribute. 29 U.S.C. § 1398(1); 29 U.S.C. § 1369(b). Thus, a sale of stock does not necessarily result in a withdrawal.[4]

However, Congress did not intend to insulate employers from withdrawal liability if an employer engages in any kind of transaction for a principal purpose of evading or avoiding its statutory liability to the plan. Thus, Section 1392(c) expressly provides that transactions having such a purpose must be disregarded, and authorizes trustees to determine and collect withdrawal liability as if the transaction to avoid it had not occurred.

Significantly, as explained in the legislative history of Section 1392(c), and as reflected in the broad but straightforward language of the text, such a transaction need not

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of liability: (1) the assets must be sold to an unrelated party in an arms'-length transaction; (2) the buyer must contribute to the plan for substantially the same number of contribution base units (*e.g.*, hours worked) as did the seller with respect to the covered operations; (3) the buyer must guarantee such contributions by posting a bond or by placing an amount in escrow; and (4) the contract of sale must impose secondary withdrawal liability on the seller and stipulate that the sale is executed in compliance with the sale of assets rule. The effect of the rule is that the buyer assumes the contribution history of the seller for the plan year of the sale and the preceding four plan years. However, the seller remains liable for the 5-plan-year period if the buyer withdraws during that period and fails to satisfy its withdrawal liability obligations to the plan.

[4] Other mitigating provisions of the statute include: Section 1386(a) (*de minimis* rule insulating small employers from withdrawal liability assessments below a threshold amount); Section 1399(c)(1)(B) (20-year cap on payments even if it would take longer to amortize the debt); Section 1405(a) (reduction of withdrawal liability following a sale of assets which does not qualify for an exemption); and Section 1405(b) (limitation of withdrawal liability for insolvent employers undergoing liquidation or dissolution).

rise to the level of a sham, a fraud, or a conspiracy. Rather, as stated by Representative Frank Thompson, a House cosponsor of the bill, "[t]his rule is to apply when evasion of liability is *a* principal purpose of a transaction *whether or not the transaction has other purposes as well.*" 126 Cong. Rec. 23038 (1980) (emphasis added). As Representative Thompson further explained, "we intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions that are less than *bona fide* and arm's length." *Id.* As pointed out by the arbitrator in *In re: The Sherwin-Williams Company and New York State Teamsters Conference Pension & Retirement Fund*, 17 Employee Benefits Cas. (BNA) 2725, 2748-49 (February 7, 1994) (Gertner, Arb.), Congress used the phrase "evade **or** avoid," with only the former term suggesting a fraudulent or deceptive intent.

The Third Circuit's ruling, which would establish a standard requiring fund trustees to prove that there were no plausible and valid reasons for a transaction other than to avoid withdrawal liability; *i.e.*, that *the* only purpose of the transaction was to evade or avoid withdrawal liability, is inconsistent with the text and plan-protective purpose of Section 1392(c), as well as with the statutory scheme in general. Most strikingly, the statutory exemptions do not leave employers scot-free to engage in commercial transactions without also requiring significant economic protection for the plan.

B. The Third Circuit's Standard Conflicts With the Sounder Standard Applied By the Seventh Circuit.

In contrast to the Third Circuit's approach, the Seventh Circuit's analysis of Section 1392(c) in *Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994) reflects Congressional intent in enacting this provision. It also provides a lucid, practical basis for establishing a

readily-applicable test to determine whether or not a transaction should be disregarded.

The issue in *Santa Fe Pacific*, as in the case at bar, was whether a parent company's sale of an ailing subsidiary which contributed to a multiemployer plan should be disregarded as a transaction to evade or avoid withdrawal liability. In both cases, the subsidiary, a trucking company, was losing money, in part because of changes in the transportation industry as the result of deregulation. Thus, in both cases, economic reasons unrelated to withdrawal liability existed, justifying the parent company's desire to get rid of its subsidiary. In contrast to the Third Circuit, however, the Seventh Circuit found that these other reasons—even if independent and compelling—were irrelevant if the evidence indicated that a principal purpose of the sale was to escape withdrawal liability.

To determine whether "a principal purpose" existed, the court focused on the method selected by the parent to divest itself of the subsidiary, noting that various commercial options would have been possible, including liquidation, partial liquidation, an asset sale, or a stock-sale. Observing that a sale of assets would have brought a higher price than a sale of stock, the court concluded that the inference was "irresistible" that millions of dollars of potential withdrawal liability figured heavily in the company's decision to sell its stock; in other words, "but for" MPPAA, the parent company would have sold the subsidiary's assets.

The court clearly recognized that Congress did not intend to establish a rule under which a parent could never sell the stock of a subsidiary contributing to a multiemployer plan without subjecting itself to actual or contingent withdrawal liability. Significantly, therefore, the court did not establish a standard in which a sale of stock would be *per se* a transaction to evade or avoid withdrawal liability (which, indeed, would be inconsistent with Section 1369(b) of ERISA and 1398(1) of MPPAA

relating to changes in corporate structure or identity). Instead, the court indicated that the sale of stock might *not* have been a transaction which the trustees could disregard under Section 1392(c), if Santa Fe had been able to prove or persuade by a preponderance of the evidence that the divestiture would have been accomplished through a stock sale whether or not MPPAA had been passed; for example, if Santa Fe had been able to demonstrate that its subsidiary would have had greater value as a going concern than on the auction block and that the sale of stock would have been a more feasible method of preserving the subsidiary as an intact concern than a cash sale of the assets. However, since the evidence indicated that the subsidiary was worth considerably more as a conglomeration of its assets than as a going concern, the court—after examining all of the possibilities for divestiture—found that the arbitrator was not "justif[ied] in concluding that the avoidance of withdrawal liability was not one of the principal purposes of the transaction." 22 F.3d at 730.

Consistent with this analysis, which establishes a straightforward "but for" test, following a review of the totality of the circumstances, the Seventh Circuit also flatly rejected the proposition that a transaction must be a sham and devoid of economic substance in order for it to be disregarded under Section 1392(c). In contrast to the Third Circuit, the court therefore found it "irrelevant" for the arbitrator to consider such issues as whether the parent knew that the purchaser of the subsidiary would fail. As such questions go to the *bona fides* of a transaction, the court's rejection of what is essentially a "good faith" defense is, of course, merely the corollary of the court's conclusion that Section 1392(c) does not require evasion or avoidance of withdrawal liability to be *the* principal purpose, but only *a* principal purpose of the transaction.

To the same effect, *see also Banner Industries, Inc. and Central States, Southeast and Southwest Areas Fen-*

sion Fund, 11 Employee Benefits Cas. (BNA) 1149 (January 22, 1989) (Graham, Arb.), *vacated by settlement,* 12 Employee Benefits Cas. (BNA) 1992 (1990). Here, the arbitrator disregarded the stock sale of a failing subsidiary, a trucking company, to an Employee Stock Option Plan (ESOP), and upheld the plan's withdrawal liability assessment against the seller, after the former subsidiary went into bankruptcy and withdrew two years after the sale. The arbitrator rejected the economic substance/good-faith requirement, stating that "[a] case can always be made that there existed some possibility for survival of an enterprise, however remote. . . . Congress could scarcely have sought to protect the integrity of pension funds and benefits for active and prospective pensioners merely with the hope an entity would survive." 11 Employee Benefts Cas. (BNA) at 1181. The arbitrator also pointed out that such an interpretation would lead to impermissible manipulation, observing that "[i]f Banner were to prevail in this dispute, it would sanction an interpretation of the statute which would enable an employer to rid itself of a failing subsidiary by propping it up for some, unspecified, length of time as long as it can subsequently demonstrate that the subsidiary had some possibility of survival." *Id.*

The Third Circuit's conclusion that the buyer as well as the seller must have an intent to evade or avoid withdrawal liability was also soundly rejected by a well-respected arbitrator in *In re: The Sherwin-Williams Company and Teamsters Conference Pension Fund, supra,* which also involved the divestiture by a parent of a financially troubled trucking company subsidiary:

> *This conclusion* [here, made by the employer] *is rejected.* The removal of liability is a seller's concern, but often a buyer takes little or no issue with the fact of this contingent obligation. To require both parties to the transaction to have an affirmative intent would emasculate the Congres-

> sional intent behind Section 4212(c) [29 U.S.C. § 1392(c)].

17 Employee Benefits Cas. (BNA) at 2749 (emphasis in original). There are countless business reasons why a buyer would purchase a company without regard to contingent withdrawal liability, even if the company is financially troubled; for example, to get the business cheap and thereby secure a customer base or management contract; to eliminate competition in a geographical area; to preserve management jobs at least for some period of time; or to use the company's losses for tax advantages. Moreover, the buyer might not perceive contingent withdrawal liability as being much of a risk, as it is a well-established fact of economic life that multiemployer plans generally recover very little (if any) withdrawal liability in the event of a bankruptcy.

For all of these reasons, the NCCMP endorses the analyses in *Santa Fe Pacific*, *Banner Industries*, and *Sherwin-Williams*, and submits that the Third Circuit has taken too literal a view of the term "transaction," as used in Section 1392(c). Although the term suggests that there must be more than one party to a deal, the Third Circuit's "good faith" defense to an "evade or avoid" claim injects a statutory requirement into the text which is simply not there. There is nothing in the term "transaction," which is much broader than the term "contract," that requires both parties to have either the same knowledge or the same intent, much less the same deceptive intent. Moreover, had Congress wished Section 1392(c) to encompass the knowledge and intent of a party other than an employer seeking to evade or avoid withdrawal liability, it could have so specified, as it did in the sale of assets exemption which imposes obligations on the buyer as well as the seller for the exemption to apply. 29 U.S.C. § 1384. However, as Congress did not intend to limit the application of Section 1392(c) to

sham transactions, as the text and legislative history indicate, there was no need to do so.

Additionally, while the case at bar centers upon the sale of a business, Section 1392(c) also applies to other scenarios, including evasion of a plan's collection efforts. In this context, the requirement that both sides of the transaction be aware of the employer's desire to evade or avoid withdrawal liability and collude in it is particularly problematic. For example, an employer may have conveyed assets to shareholders, as ostensible repayments of the shareholders' equity, with a principal purpose of making those assets unavailable to satisfy a plan's assessment of withdrawal liability. In many cases, the shareholders may have no knowledge of the fact of the assessment, let alone the employer's motivation to avoid it.[5] Nevertheless, under the Third Circuit's rationale, Section 1392(c) would not apply.

Moreover, the range of possible means of evasion covers all tricks by transfer known to the common law of fraud, such as gifts or "sales" to family and friends. The Third Circuit's rule places such transfers—even without consideration—beyond recovery absent proof that the recipient of the gift participated in the transactions with a conscious and admitted intent to help the seller evade withdrawal liability. As some courts have held that state-law remedies for fraud are preempted,[6] and donees may

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[5] *See Connors v. Vick*, 15 Employee Benefits Cas. (BNA) 1342 (S.D. W.Va. 1992) (real estate conveyance to spouse not permitted to defeat collection efforts of plan against individual employer in spite of spouse's alleged lack of knowledge); *Central States Southeast and Southwest Areas Pension Fund v. Minneapolis Van and Warehouse*, 764 F. Supp. 1289 (N.D. Ill. 1991) (shareholder's lack of knowledge no defense to plan's claim for withdrawal liability payments against dissolved corporation whose assets were distributed to shareholder; knowledge not precondition for imposition of withdrawal liability).

[6] *Central States, Southeast and Southwest Areas Pension Fund v. Marquette Bank*, 836 F. Supp. 673 (D. Minn. 1993) (state remedies for fraudulent conveyances preempted).

have no inclination to look behind the transaction, the Third Circuit's rule would deprive multiemployer plans of a remedy under federal law for fraudulent transactions to evade withdrawal liability.

Clearly, review of this aspect of the Third Circuit's standard is urgent, as courts and arbitrators are already in conflict as to the role which good faith should play in interpreting Section 1392(c), and a misreading of the provision will have drastic consequences for multiemployer plans, as evidenced by the facts of this case.

C. The Third Circuit's Standard Will Seriously Undermine the Plan-Protective Purpose of ERISA's Controlled-Group Definition of "Employer."

Section 4001(b)(1) of ERISA, 29 U.S.C. § 1301 (b)(1), provides that all trades or businesses under common control are to be treated as a single employer for all purposes of Subchapter III (which includes the withdrawal liability provisions of MPPAA).

Controlled groups consist of three types: parent-subsidiary, brother-sister, and combined controlled group. However, whether any of these controlled groups exist is determined exclusively on the basis of common ownership interests under applicable Treasury Regulations; common management, employees, lines of business, or similar economic factors are irrelevant. Accordingly, an entity contributing to a multiemployer plan will be a component member of a controlled group if it is a subsidiary, a parent, or has owners in common with one or more other trades or businesses—whether or not any of the other businesses is also a contributing employer.

If a contributing entity permanently ceases to have an obligation to contribute to a plan, or permanently ceases covered operations, its membership in a controlled group and/or the characteristics of the other members of the group will determine whether a withdrawal from a plan

has occurred; whether the withdrawal is partial or complete; the date of withdrawal; the amount of withdrawal liability; and the entities from which the liability can be collected. Depending on the facts, the controlled group definition of "employer" can result in a determination that no withdrawal has occurred.

Conversely, the controlled group definition is of singular financial importance within the statutory scheme because it enables the trustees to collect an assessment from solvent members of the group if the contributing entity has insufficient assets. That this is often the case is evident from the facts at bar, as well as from the facts in *Santa Fe Pacific, Banner Industries, and Sherwin-Williams, supra.* As those cases reveal, however, Section 1392(c) precludes parent corporations or other owners from ousting the contributing employer from the group to protect the other members' financial interests if a principal purpose of the transaction selected for divestiture is to evade or avoid actual or contingent withdrawal liability. However, the more lenient the standard is for making this determination, the easier it will be for the solvent member or members of a controlled group to dump a contributing employer by severing its connection with the group, thereby undermining the fiscal integrity of the plan or shifting the funding burden to other contributing employers. That Congress acted rationally in imposing joint and several liability on members of a controlled group was settled long ago in the context of single employer plans. *See PBGC v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). The same principles apply to controlled group liability in the context of multiemployer plans.

The NCCMP submits that the Third Circuit's lenient standard for interpreting Section 1392(c), under which it will be nearly impossible for trustees to sustain a claim, will seriously undermine the plan-protective purposes of

Section 1301(b)(1), which is a cornerstone of the statute. For this reason, too, the NCCMP requests review.

II. A UNIFORM STANDARD IS NECESSARY TO PROVIDE GUIDANCE TO ARBITRATORS AND COURTS AND TO DISCOURAGE FORUM-SHOPPING.

Congress intended that "evade or avoid" disputes be resolved in arbitration. While either party may contest the decision, federal court review is limited. As provided in Section 1401(c): "In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct."

As the cases discussed above indicate, the factual records in arbitrations involving "evade or avoid" disputes tend to be very long, detailed, and complex. Moreover, as Congress intended the arbitrator to function as a kind of judge within the statutory scheme, the arbitrator's conclusions necessarily involve mixed questions of fact and law. Hence, it is frequently difficult to ascertain whether a conclusion is one of fact or law. This, in turn, makes it difficult for reviewing courts to assess how the arbitrator applied the presumption attaching to the plan sponsor's determinations and to review the arbitrator's decision in the manner required by this Court in *Concrete Pipe, supra*. As the case at bar reveals, the arbitrator correctly stated the standard of review applicable to the trustees' determination that Tiger's divestiture of Hall's was a transaction to evade or avoid withdrawal liability; however, rather than according the trustees' determination a presumption of correctness and shifting the burden to the employer to demonstrate the absence of such a purpose, he allowed the burden to remain with the trustees by requiring them to show that no plausible and valid reasons existed for the stock sale, even though the timing of the sale, the consideration paid for the stock, the

existence of other possibilities to get rid of Hall's, and the fact that the buyer was an insider raised an "irresistible" inference that Tiger divested itself of Hall's in the manner it did for a principal purpose of evading withdrawal liability. Because the arbitrator stated the correct standard of review, the district court allowed the decision to stand, and the Third Circuit affirmed.

Compounding the inherent difficulty of applying the presumptions in factually complicated situations and applying the law to the facts, is the reality that arbitrators are often not lawyers, come from different backgrounds, have different types and levels of experience, and do not apply the "common law of the shop," as in labor arbitration. Moreover, arbitrators have no overall agency structure for policy guidance and neither the statute nor the regulations provide any basis for an arbitrator to identify the circuit whose law should control the decision in a particular case. Thus, a uniform standard for interpreting Section 1392(c) to assist the arbitrator in evaluating the evidence presented by the plan and the employer is urgently needed to avoid the disarray that presently exists, and to prevent the presumption favoring arbitrators' decisions from harming plans in a manner that Congress did not intend and probably did not anticipate.

Further, while arbitration decisions are reviewable in "an appropriate United States court in accordance with Section 1451," 29 U.S.C. § 1401(b)(2), there is nothing in the statute requiring either party to proceed in the same jurisdiction in which the arbitration took place. MPPAA's venue provision, Section 1451(d), 29 U.S.C. § 1451(d), states only that an action may be brought where the plan is administered or where a defendant resides or does business. Employers and plans can therefore be expected—to the extent possible—to race to a court in the jurisdiction having the most favorable precedent after an unfavorable award. As employers having

the largest liability may be national employers doing business all over the country, such a result could have a substantial adverse impact on multiemployer plans. A uniform standard is needed to discourage forum-shopping.

Section 1392(c) has become the focus of the largest withdrawal liability disputes. A uniform standard of liability under this Section will aid arbitrators and the courts in the disposition of cases. As important, it will provide plans and their contributing employers with necessary guidance for planning and structuring business transactions with pension implications and reduce or limit litigation in this area. The NCCMP submits that a uniform standard for interpreting this provision is necessary, and that guidance can come only from this Court. The NCCMP therefore requests this Court to review and reverse the decision of the Third Circuit, and to adopt either the standard applied by the Seventh Circuit or a similar standard equally protective of multiemployer plans.

CONCLUSION

For the reasons stated above, the NCCMP requests the Court to grant the Petition and to review and reverse the decision below.

Respectfully submitted,

GERALD M. FEDER *
DIANA L.S. PETERS
FEDER & ASSOCIATES, P.C.
1350 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036-1712
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

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* Counsel of Record